Filed 3/10/09 In re J.P. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re J.P., et al., Persons Coming Under the Juvenile Court Law.	B208288 (Los Angeles County Super. Ct. No. CK63495)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.N., et al., Defendants and Appellants.	

APPEALS from orders of the Superior Court of Los Angeles County, Anthony Trendacosta, Temporary Judge. Affirmed.

John Cahill, under appointment by the Court of Appeal, for Defendant and Appellant J.N.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant A.P.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel and Kirstin J. Andreasen, Associate County Counsel for Plaintiff and Respondent.

Father J.N. appeals from the juvenile court's denial of his request for a continuance of a permanency planning hearing under Welfare and Institutions Code section 366.26[1] in this dependency case. Mother A.P. argues the juvenile court erred in finding the children adoptable at the section 366.26 hearing. Each appellant joins in the arguments made by the other. We find no abuse of the juvenile court's discretion in denial of the continuance, and conclude that the juvenile court's determination that the children were adoptable was supported by substantial evidence.

FACTUAL AND PROCEDURAL SUMMARY

Children J.P., P.N., and N.N., respectively three years old, one year old, and four months old, along with their five-year-old half-sibling.[2] were found home alone by police on May 23, 2006. The apartment had no furniture. A filthy, wet carpet was on the floor. The eldest child said that mother and father abused the children. Mother and father were arrested when they returned home two hours after the police arrived. The children were detained by the Department of Children and Family Services (DCFS) and placed in foster care. A section 300 petition based on inappropriate supervision and father's extensive criminal history was filed. Mother and father pled nolo contendere to criminal charges of willful cruelty to a child and were placed on probation, ordered to perform community service, and to attend a 52-week parenting class.

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[1] Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] There are no issues on this appeal concerning the older half-sibling.

Father was arrested on felony burglary charges in June 2006 and remained incarcerated for the duration of the dependency proceedings. The following month mother was arrested, but was then released.

The children were placed in foster care and made progress. After the petition was sustained as amended, mother was ordered to attend a parenting course and individual counseling. Father was denied services. The children were placed together in a new foster home where they were thriving, displaying no emotional or mental problems. P.N. was referred for a neurological evaluation and regional center services. J.P. had improved his behavior in school. N.N. was referred to the regional center.

The foster mother was not interested in adopting the children because of a previous negative experience with an attempted adoption. The maternal great-grandmother expressed interest in having the children with her, but allowed mother to live with her, and was unwilling to require mother to move out so the children could be placed in her home. An adoption assessment of all three children was conducted in December 2006 and all were found likely to be adopted.

Mother's reunification services were terminated on March 7, 2007, and a permanency planning hearing was set under section 366.26 for September 6, 2007. The hearing was continued repeatedly until May 21, 2008. During that period, the parents identified the maternal great-grandmother as a possible relative for placement, but her telephone number had been disconnected. Father asked the social worker for help in locating his brother and mother as possible relatives for placement.

The children were placed in the prospective adoptive home of Mr. and Mrs. S.[3] on July 9, 2007, following several visits and an overnight stay. The adoptive home study for the S.'s had been completed on August 1, 2006. The S.'s were committed to adopting all three children. They had no other children, had been married for 17 years, had a stable home, employment, and a strong support system. P.N. and N.N. remained clients of the

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[3] The prospective adoptive mother is Mrs. G., but for simplicity, we follow the practice of counsel and refer to the adoptive parents as the S.'s.

regional center because of developmental delay. None of the children was in therapy, but the S.'s were willing to monitor the need for counseling and to provide it if necessary.

In September, DCFS was ordered to assess placement with maternal grandmother. According to the December 2007 interim review report, maternal grandmother said she could not support the children financially and had no accommodations for them in the house where she rented a room. Maternal grandmother did not follow through on the social worker's request that she submit to fingerprinting in order to be Livescanned.[4]

Mother was arrested on October 29, 2007. On May 21, 2008, a last minute information for the court was filed stating that a referral had been called into the child protection hotline alleging that the children were the victims of neglect by the prospective adoptive parents. An emergency social worker visited the home the next day and determined the report was unfounded. J.P. and N.N. were healthy and had no marks or bruises. J.P. said that none of the children had been hit and that he liked being with the foster parents. N.N. was well attached to the foster mother. The caseworker had seen the children two days before the hotline referral was made and observed a small scratch on P.N.'s upper lip, which the foster parents explained was the result of a fall during a family hike. The children were comfortable with the foster parents.

A paternal uncle, R.N., and his fiancée, had two monitored visits with the children. R.N. expressed interest in having the children stay with the family. Both he and his fiancée had criminal records. He found out the children were in foster care in March 2008, although father knew that R.N. had the same cell phone number for over five years.

At the section 366.26 hearing, the juvenile court observed that the request by father's attorney for a continuance to address the relative placement preference under section 361.3 was not proper and indicated that it would treat the request as being for an oral section 388 hearing. In either case, the court concluded that further delay was not in the best interests of the children. It denied the request. Two further requests for a

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[4] "'LiveScans' are the method by which DCFS obtains comprehensive criminal background checks as required by Health and Safety Code section 1522." (*In re Darlene T.* (2008) 163 Cal.App.4th 929, 933, fn. 2.)

continuance by father were denied. County counsel argued the children are adoptable and that no exceptions to the termination of parental rights applied. Counsel for the children joined in this position. Mother and father opposed termination of their rights.

The court found that parents had failed to prove the applicability of any exception to termination of their rights, and found by clear and convincing evidence that the children were adoptable. It also found that it would be detrimental to return the children to their parents. Parental rights were terminated, and the children were declared free from the care, custody, and control of their parents. They were placed under the control of the DCFS for adoptive planning and placement. Mother and father filed timely appeals from the order terminating parental rights, and father appealed from denial of his motion to continue the hearing.

DISCUSSION

I

Father argues the juvenile court abused its discretion by denying his request for a continuance of the section 366.26 hearing. He cites section 352, subdivision (a), which states that a hearing may be continued "provided that no continuance shall be granted that is contrary to the interest of the minor." The statute sets out factors for the court to consider in determining the child's interests: "In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." Father also cites section 366.26, subdivision (g), which allows a 30-day continuance "as necessary to appoint counsel, and to enable counsel to become acquainted with the case." He argues that his counsel substituted into the case on the day of the May 21, 2008 hearing and was not ready to proceed. Father also contends denial of the continuance violated his right to competent counsel.

At the May 21, 2008 section 366.26 hearing, counsel for father requested a continuance. While counsel acknowledged that his firm had been representing father for

"a while" (since September 6, 2007), he was substituting for another attorney and had only a few days to review the file. Counsel had contact with paternal uncle R.N. and uncle's fiancée. He argued that little effort had been made by DCFS to locate paternal relatives for possible placement of the children, despite a court order that such an investigation be conducted.

Father had provided DCFS with the names of his mother and a brother, but had given no contact information, other than saying they lived in Bakersfield, California. The social worker requested a telephone number because she said many people in Bakersfield had the same last name as father. Counsel argued that before the children were placed with the prospective adoptive parents, father had provided DCFS the maiden and married name of paternal grandmother, with her date of birth, as well as the name and birth date of his brother, R.N. According to the paternal family, there are few people in Bakersfield with their last name, and they are all related. R.N. had been in the same residence for eight years with the same telephone number for five years. Paternal uncle had adopted children and had been caregiver for children who were not his biological children.

Counsel for the children opposed the continuance, arguing it was in the best interests of the children to terminate parental rights, a position with which counsel for DCFS joined. She argued that the paternal family connection was not close since R.N. did not know father was in prison and that the children were in foster care until March 2008. She argued there was no family relationship to maintain by placing the children with the paternal relatives. DCFS also expressed concern that the paternal relatives had made the unfounded hotline negative referral of the prospective adoptive parents. She argued that it was not in the best interests of the children to delay the section 366.26 hearing any longer.

As we have stated, the court indicated that the question of placement with the paternal relatives was not properly before it at a section 366.26 hearing, but accepted father's request as an oral section 388 petition. Citing *In re Lauren R.* (2007) 148 Cal.App.4th 841, the court considered the factors regarding relative placement and concluded there was no basis to change placement. Whether treated as a request for

continuance or an oral section 388 petition, the juvenile court concluded that it would not be in the best interests of the children to prolong the hearing.

In *Lauren R., supra*, 148 Cal.App.4th 841, the court addressed the relative placement preference set out in section 361.3 and held: "The overriding concern of dependency proceedings, however, is not the interest of extended family members but the interest of the child. '[R]egardless of the relative placement preference, the fundamental duty of the court is to assure the best interests of the child, whose bond with a foster parent may require that placement with a relative be rejected.' [Citation.] Section 361.3 does not create an evidentiary presumption that relative placement is in a child's best interests. [Citation.] The passage of time is a significant factor in a child's life; the longer a successful placement continues, the more important the child's need for continuity and stability becomes in the evaluation of her best interests. [Citation.]" (*Id.* at p. 855.)

We review denial of a continuance for abuse of discretion. (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 585.) Section 352, subdivision (a) has been interpreted as discouraging continuances. (*Ibid.*) We find no abuse of discretion in the denial of the continuance in this case. The same firm had been representing father for nearly nine months. The attorney who appeared for him at the May 21, 2008 hearing did not adequately explain why he was not prepared to proceed, although he had had the case for "a matter of days." Mother's reunification services had been terminated in March 2007. The section 366.26 hearing had been repeatedly continued. The children had been placed with the prospective adoptive parents since July 2007. Considering the factors set out in section 352, subdivision (a), a further continuance was not in their interest.

II

Father also argues the juvenile court abused its discretion when it denied him an opportunity to file a written petition under section 388. DCFS raises two procedural issues in addition to arguing the denial did not constitute an abuse of discretion.

DCFS argues that father did not challenge this order in his notices of appeal. Father filed two notices of appeal from the termination of his parental rights, followed by

a third appeal stating that he is appealing from all findings and orders made on May 21, 2008, including the denial of the oral section 388 petition. California Rules of Court, rule 8.400(c)(2) requires that we liberally construe the notice of appeal in a juvenile case; it is sufficient if it identifies the particular judgment or order being appealed. "'[I]t is, and has been, the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what [the] appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.'" (*In re Joshua S.* (2007) 41 Cal.4th 261, 272, quoting *Luz v. Lopes* (1960) 55 Cal.2d 54, 59.) We conclude that father perfected his appeal from denial of his oral section 388 petition.

DCFS next challenges father's standing to raise the relative placement issue, citing *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023. We prefer the approach of the court in *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, which accorded standing to a parent whose rights had not been terminated to raise the issue of relative placement. The *Esperanza C.* court recognized the potential impact of relative placement on the determination of the child's best interests and permanent plan. (*Id*. at pp. 1053-1054.) This takes us to father's claim that he was entitled to a continuance to file a written section 388 motion based on the relative placement issue.

"Section 388 permits '[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court' to petition 'for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court' on grounds of 'change of circumstance or new evidence.' (§ 388, subd. (a).) 'If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held and shall give prior notice . . . .' (*Id.*, subd. (c).) Section 388 thus gives the court two choices: (1) summarily deny the petition or (2) hold a hearing. [Citations.] In order to avoid summary denial, the petitioner must make a '"prima facie"' showing of 'facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.' [Citations.] '[I]f the petition fails to state a change of circumstances or new

evidence that might require a change of order, the court may deny the application ex parte. [Citation.]' (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450.) On the other hand, 'if the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.' (*In re Heather P.* (1989) 209 Cal.App.3d 886, 891.)" (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) We review a summary denial of a section 388 petition for abuse of discretion. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079.)

Father argues that his attorney made a sufficient showing that DCFS had not adequately investigated placement with paternal relatives, thus warranting a continuance in order to more fully develop the argument in a written section 388 petition. DCFS cites the juvenile court's observation that paternal uncle R.N. had not been ASFA approved, which meant that the children could not be placed with this uncle even if the court was inclined to grant father's petition.[5] On this record, we find no abuse of discretion. The children had been placed with the prospective adoptive parents for over nine months when father raised the issue of relative placement at the section 366.26 hearing. While there had been two positive visits between the children and paternal relatives, father did not make a prima facie case that removing the children from a stable home where they were thriving would be in their best interests.

III

Mother challenges the juvenile court's finding that the children are adoptable. She bases her challenge on evidence that P.N. and N.N. suffer from developmental delays and that J.P. has behavioral problems, including aggression toward his younger siblings. She contends that recommended neurological, hearing and physical therapy evaluations had not been performed. She also contends DCFS failed to obtain proper services for the

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[5] "The term 'ASFA' refers to the Adoption and Safe Families Act of 1997, which establishes the federal guidelines for foster care and relative care placements. ([42 U.S.C. § 670 et. seq.]) The approval process for securing AFDC-FC funds is colloquially called 'ASFA approval,' which is required before a caregiver may receive AFDC-FC funds." (*In re Darlene T., supra*, 163 Cal.App.4th at p. 932, fn. 1.)

children. As a result, there was incomplete information for an assessment of adoptability at the section 366.26 hearing, and thus no substantial evidence to support the court's finding the children were adoptable.

DCFS argues that the issue was not preserved on appeal because mother did not raise it in the juvenile court. We disagree. While there is a split of authority on the point, we find no forfeiture of an issue of substantial evidence to support the court's finding. (See *In re Brian P.* (2002) 99 Cal.App.4th 616, 622-623.)

The adoptability issue at a section 366.26 hearing focuses on the dependent child, e.g., whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt. (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1408.) "[I]t is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citation.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 (*Sarah M.*).) "[A] prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*." (*Id*. at p. 1650.)

There was substantial evidence to support the court's determination the children are likely to be adopted. While they have behavioral and developmental problems, all were steadily improving. The prospective adoptive parents had successfully dealt with these issues since the children were placed with them in July 2007, they were committed to adopting, and they had the ability to address the children's special needs. As DCFS points out, the children were in a long-term placement with a foster mother between November 2006 and July 2007, and then were placed with the prospective adoptive parents. These successful placements indicated the ability of the caregivers to deal with the children's special needs.

Mother relies upon *In re Valerie W.* (2008) 162 Cal.App.4th 1, in which deficiencies in an adoption assessment were found to undermine the juvenile court's finding that the minors were adoptable. In that case, one of the two prospective adoptive parents had not been assessed. (*Id*. at pp. 14-15.) The Court of Appeal expressed

concern regarding the ability of a mother and adult daughter to jointly adopt. (*Id*. at p. 16.) In addition, one of the minors had a chronic severe health condition. (*Id.* at p. 15.) Here, both adoptive parents (a married couple) had been assessed and found able to provide a loving, stable home and to address the special needs of the children.

Substantial evidence supports the juvenile court's finding the children were adoptable.

DISPOSITION

The orders are affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.